IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

IN RE:	§	
	§	
GUS TRUJILLO,	§	CASE NO. 00-21099-13
	§	
DEBTOR.	§	

MEMORANDUM OPINION

The Debtor, Gus Trujillo, filed his motion, as amended and supplemented, seeking reinstatement of his case, which was dismissed with prejudice to refiling for 180 days, or, alternatively, a new trial of the hearing that resulted in dismissal. The order dismissing Mr. Trujillo's Chapter 13 case was entered July 10, 2001, on motion by the Chapter 13 Trustee.

This court has jurisdiction of this matter under 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A). This Memorandum Opinion contains the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

The Chapter 13 Trustee filed his motion on March 12, 2001. A hearing on the motion was originally set for April 19, 2001. This hearing was continued to July 6, 2001. Both the Trustee and Mr. Trujillo were provided with a copy of the court's order continuing the hearing. Mr. Trujillo failed to appear at the hearing; his case was therefore dismissed with prejudice to refiling for 180 days. His motion seeking reinstatement or a new trial was filed July 27, 2001, 17 days after entry of the order dismissing his case.

Mr. Trujillo has represented himself throughout this Chapter 13 case. He has advised the court that he is a lawyer, but his license has been revoked by the State Bar of Texas. In fact, in a prior bankruptcy case of Mr. Trujillo, a hearing was held on a motion of the State Bar of Texas seeking relief from the stay, if necessary, to allow the State Bar to proceed with enforcement of certain actions against Mr. Trujillo.

Mr. Trujillo's request for a new trial must be denied as it was not timely filed. *See* Fed. R. Bank. P. 9023; Fed. R. Civ. P. 59(b) (a motion for new trial must be filed no later than 10 days after entry of the judgment).

Mr. Trujillo's request for reinstatement is construed as a motion for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure, as incorporated by Rule 9024 of the Rules of Bankruptcy Procedure. Rule 60,

entitled *Relief from Judgment or Order* states that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ." *See* Fed. R. Civ. P. 60(b). A party has one year in which to file a motion for relief from judgment. *See id.* Mr. Trujillo's motion satisfies this requirement and is therefore eligible for consideration under Rule 60.

Contrary to his pleadings and his initial testimony, Mr. Trujillo admitted at the hearing on his motion that he received a copy of the court's order setting hearing for July 6, 2001, on the Trustee's motion to dismiss. The court notes, however, that Mr. Trujillo has appeared at other hearings before the court and the court thus concludes his failure to appear on July 6 was not intentional or willful.

Mr. Trujillo fails to state the specific Rule 60 basis justifying relief from the dismissal order and thus reinstatement. From a review of the pleadings and upon considering Mr. Trujillo's testimony, the court construes the "excusable neglect" standard as the applicable basis for determining whether relief should be granted. In this regard, Mr. Trujillo is charged with the responsibility of monitoring his bankruptcy proceedings and adequately informing himself about the deadlines and requirements of his case. *See Prior Prods. Inc. v. Southwest Wheel-NCL Co.*, 805 F.2d 543, 546 (5th Cir. 1986). Failure to make deadlines and to stay informed is considered, for Rule 60(b) purposes, under the "excusable neglect" standard, the logic being that it is negligent to fail to adequately inform one's self about the requirements of one's case.[1] *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388-95 (1993); *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 380-81 (9th Cir. 1997).

The "excusable neglect" standard is comprised of two inquires: does movant's conduct constitute neglect, and if so, was movant's neglect excusable? *See Pioneer Inv. Servs. Co.*, 507 U.S. at 388-90. The Supreme Court defined neglect as "giv[ing] little attention or respect to a matter, or . . . leav[ing] undone or unattended *especially through carelessness*." *Id*. at 388 (emphasis in original)(internal quotations omitted). "Excusable neglect" under Rule 60(b) is not available in a situation where a party's failure to act is due to circumstances outside of the party's

[1]There is a whole line of cases that consider situations in which a failure to make deadlines, etc., was outside of the scope of negligence. Acts of God, genuine mistakes made by courts, and willful refusals to act are treated differently under Rule 60 than is neglect. Because Debtor has not hinted that any of these causes were factors in his failure to appear at the dismissal hearing, there is no need to analyze such cases here.

control, because this would not constitute neglect. *See id.* at 394. Rather, neglect "lies between an inability to respond and an intentional flouting of a deadline." *Longshore v. Bhandari (In re Bhandari)*, 161 B.R. 315, 318 (Bankr. N.D. Ga. 1993). Because Mr. Trujillo does not argue that circumstances outside of his control caused him to miss the hearing, and because there is no indication that his failure to appear was willful, his failure falls within the definition of neglect. *See id. See also Pioneer Inv. Servs. Co.*, 507 U.S. at 388-95; *Briones*, 116 F.3d at 380-81.

Once neglect has been established, the next inquiry is whether that neglect is excusable. *See Pioneer Inv. Servs. Co.*, 507 U.S. at 395. The purpose of this inquiry is to set a high bar for granting relief from a judgment so as to deter parties from freely ignoring court deadlines and orders. *See id.* The Supreme Court in *Pioneer* held that the determination of whether an act or failure to act is excusable is "at bottom an equitable one, taking account of all relevant circumstances surrounding [a] party's omission." *Id*. Some of the *Pioneer* factors to be included in making such an equitable determination include: (1) the danger of prejudice to other parties; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *See id*; *Briones*, 116 F.3d at 381 (holding that these factors specifically apply to a Rule 60(b) analysis and that these factors are not exclusive). Because the determination of "excusable neglect" is heavily rooted in equity, a court has broad discretion in deciding whether or not to grant "excusable neglect" relief. *See Briones*, 116 F.3d at 380; *Prior Prods. Inc. v. Southwest Wheel-NCL Co.*, 805 F.2d 543, 545 (5th Cir. 1986); *Mendell In Behalf of Viacom Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990).

Beyond the narrow question of whether Mr. Trujillo's failure to attend the July 6 hearing was excusable is the broader more substantive issue of whether dismissal was warranted. In this regard, the court notes that this is Mr. Trujillo's second bankruptcy filing, filed shortly after his prior case was dismissed, that his proposed plan projects a distribution to unsecured creditors of 0.27%, that the last plan payment made by Mr. Trujillo was April 20, 2001, and that he would have to pay approximately $1,975.00 to bring his payments current if his case were reinstated. Mr. Trujillo testified that he is in dire financial straits. He apparently owes significant amounts on ad valorem taxes, to the State Bar of Texas, to the state collection agency for past due child support, and to the IRS. He testified that he presently works "time and a half" for "near minimum wage." Mr. Trujillo is divorced, but does not have custody of his children.

Accordingly, while Mr. Trujillo's failure to appear at the July 6 hearing may have been excusable under the "excusable neglect" standard, it is apparent from consideration of the evidence presented on his motion for reinstatement that dismissal of his Chapter 13 case was justified. Despite this, the evidence is insufficient to warrant dismissal with prejudice. No evidence was proffered at the July 6 hearing; the evidence presented at the hearing on the present motion does not justify dismissal with prejudice to refiling. Section 349(a) of the Code states that "[u]nless a court, for cause, orders otherwise . . . the dismissal of a case under this title [does not] prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title." 11 U.S.C.A. § 349(a) (2000). The court concludes that, on the record before the court, Mr. Trujillo's conduct does not rise to the level of "cause" justifying dismissal with prejudice to refiling. Mr. Trujillo is admonished, however, that even a minor indiscretion in a subsequently filed bankruptcy case will tip the scales beyond the "cause" threshold.

Upon the foregoing, the court denies reinstatement of Mr. Trujillo's case but modifies the court's July 10 order of dismissal to provide that such dismissal is without prejudice to refiling. The court will prepare an order.

Signed September 25, 2001.

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ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE